April 15, 1948

TO: U

FROM: L - Ernest A. Gross

For purposes of consideration of requests by Congressional Committees, either through subpoenas duces tecum or otherwise, for the production of records, reports and files of the Department, I believe that the Department's records, reports and files may be divided into the following categories -

(1) those which you are obligated not to produce;

(2) those which you may in your discretion produce or decline to produce; and

(3) those which you are obligated to produce.

The classes of material embraced in each of these three categories are discussed below:

(1) Records, reports and files which there is an obligation not to produce.

(a) The President's Directive of March 13, 1948 requires that requests from unauthorized sources for reports, records and files relative to the Employee Loyalty Program be declined and referred to the Office of the President for such response as the President may deem to be in the public interest in the particular case. This Directive places an obligation on the heads of all Executive Departments to decline any request by a Congressional Committee for records, reports and files relating to the Employee Loyalty Program.

(b) The Security Regulations of the Department and Section 161 of the Revised Statutes (5 U.S.C. 22) require that reproduced material originating in another Department or Agency not be produced without the specific authorization by the originating Agency. Under Section 161, heads of

Departments

Departments have authority to prescribe regulations governing the use and disposition of their files and records.

(c) The production of material loaned to the Department by other Departments or Agencies would also, in the absence of authorization from those Departments or Agencies, be in violation of the right given them by Congress to prescribe rules and regulations for the use and custody of their records and files.

(d) The same principle applies in cases of joint inter-agency documents, such as policy directives of SANACC. The concurrence of all the Departments or Agencies responsible for their issuance would be required for their release.

(2) Records, reports and files, the production of which is discretionary.

Where the material requested relates to the negotiation of treaties, communications with foreign governments, or other matters over which the Executive has exclusive power under the Constitution, its production may be declined, either on the ground that it would not be compatible with the public interest to release it, or that it related to matters falling exclusively within the jurisdiction of the Executive.

The discretionary power of the Secretary of State, or ultimately of the President in performing his foreign affairs functions, to refuse a Congressional request for documents is extremely broad. Information has generally been withheld (1) in order to protect confidential sources of information and to insure the effective functioning of investigative or intelligence agencies of the Government, (2) where disclosure would obstruct or prejudice pending international negotiations, (3) where the conduct of foreign relations would be embarrassed by divulging information to subversive elements or to governments hostile to the purposes of United States foreign policy; or in similar circumstances.

In cases of doubt, of course, the question would generally be resolved in favor of maintaining amicable relations between the executive and legislative branches of the Government.

(3) Records

(3) Records, reports and files which there is an obligation to produce.

If the subject matter of the request is not one which the Constitution has vested exclusively in the Executive but has a relationship to something which may be an appropriate subject of legislation by Congress, there would be no sound reason for declining the request. Such Departmental material as visa and passport files and personnel records might reasonably be placed in this category, unless they contain material which would warrant their classification in categories (1) and (2).

L/S:JMKeegan:fje

April 15, 1948

Responsibility of the Department with Respect to Requests by Congressional Committees for Production of Records.

Problem:

The question has been raised as to what classes of its records, reports and files the Department is obligated to produce in response to requests from Congressional Committees, what classes it may in its discretion produce or decline to produce, and what classes it is obligated not to produce.

Discussion:

As indicated in the memorandum of January 14, 1948, prepared with Mr. Gray, the Courts have never passed squarely on the unsettled question of how far Congress can go in obtaining information from the executive branch of the Government, although there are numerous cases upholding its general power to investigate in aid of a legislative purpose.1/ Several writers have attributed the absence of judicial decisions on the question of Congress' power to investigate the Executive to the fact that so few conflicts have arisen between the legislative and executive branches of the Government and when they did arise they were generally resolved by the retreat of one of the Departments.2/ While it appears that executive departments have generally acceded to requests for information by Congressional Committees, there are numerous instances, the details of several of which are set forth in the memorandum of January 14, 1948 of refusals by the Department to furnish information requested by Committees of Congress, usually on the ground that the disclosure of the information would not be in the public

interests.

1/ McGrain v. Daugherty (1927), 273 U.S. 135, 161; In re Chapman (1897), 166 U.S. 661; Townsend v. U.S., 95 F. 2d 362.

2/ Ehrman, Duty of Disclosure in Parliamentary Investigations, 11 U. of Chi. Law Rev., 1942; Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153.

interests.3/ In every instance, the information requested related to such exclusively foreign affairs functions as negotiations of treaties or communications with foreign governments.4/ The conclusion was reached in the earlier memorandum that the Department would not be warranted in refusing to produce visa files in response to a request to a Committee of Congress, since the entry of aliens was not a matter falling exclusively within the jurisdiction of the Department under the Constitution.5/

While the question of the extent to which Congress might properly go in obtaining information from the Executive has never been squarely passed upon by the courts, the Attorney General did, as recently as April 30, 1941,6/ have occasion to consider the question whether he should comply with a request from the Chairman, House Committee on Naval Affairs, for certain reports of the Federal Bureau of Investigation. In declining the request, the Attorney General gave the following reasons, among others:

> "It is the position of this Department, restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid on the President by the Constitution to 'take care that the laws be faithfully executed', and that congressional or public access to them would not be in the public interest.
>
> "Disclosure of the reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely on. This is exactly what these reports are intended to contain.
>
> "Disclosure

3/ George Washington, however, in 1796, based his refusal to furnish the House of Representatives with certain papers relating to the negotiation of the treaty with the King of Great Britain, on the ground that the assent of the House was not necessary to the validity of a treaty and that the treaty exhibited in itself all the objects requiring legislative provision.

4/ See Letter from Library of Congress, March 10, 1948 to Hon. Clare E. Hoffman, in House Report No. 1595, 2d Session, upholding right of executive to decline to furnish this type of information.

5/ See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-322, for comprehensive discussion of extent of executive foreign relations powers.

6/ 40 Op. Atty. Gen. No. 8.

"Disclosure of the reports at this particular time would also prejudice the national defense and be of aid and confort to the very subversive elements against which you wish to protect the country. For this reason we have made extraordinary efforts to see that the results of counterespionage activities and intelligence activities of this Department involving those elements are kept within the fewest possible hands. A catalogue of persons under investigation or suspicion, and what we know about them, would be of inestimable service to foreign agencies; and information which could be so used cannot be too closely guarded.

"Moreover, disclosure of the reports would be of serious prejudice to the future usefulness of the Federal Bureau of Investigation. As you probably know, much of this information is given in confidence and can only be obtained upon pledge not to disclose its sources. A disclosure of the sources would embarrass informants - sometimes in their employment, sometimes in their social relations, and in extreme cases might even endanger their lives. We regard the keeping of faith with confidential informants as an indispensable condition of future efficiency."

After citing several instances in which the executive had declined to Congress and the courts information which it had acquired and the disclosure of which it felt would be incompatible with the public interests, the Attorney General referred to several court decisions to support the contention that the courts cannot require the executive to produce papers when in the opinion of the executive, their production is contrary to the public interests and that the question whether the production of the papers would be against the public is one for the executive and not for the courts to determine. Most of these cases, however, involved court proceedings, and none of them raised the precise question of the extent of the authority of Committees of Congress to obtain information from the executive. Nevertheless, it is believed that in the absence of a court decision on the question, the opinion of the Attorney General, who is the principal law officer of the Government, should be followed. Moreover, the considerations mentioned in the excerpt quoted above from the opinion of the Attorney General would seem to be applicable to other intelligence

agencies

agencies besides the Federal Bureau of Investigation, particularly those having to do with matters directly affecting our foreign relations. In his opinion Attorney General Jackson also referred to an opinion of the Attorney General, dated January 5, 1905,7/ in which reference was made to Section 161 of the Revised Statutes8/ and the following conclusion drawn therefrom:

> "It thus appears that the head of a Department has full charge and control of all the records and papers belonging to the Department. His authority to prescribe whatever rules and regulations he may deem proper regarding their use and custody is unlimited, so long as 'not inconsistent with law.' Such broad discretion would necessarily include the right to determine whether certain documents should or should not be taken from the files of the Department for any purpose except for use in connection with departmental business, and in accordance with his determination so to instruct the chiefs of bureaus or other officers concerned."

The considerations mentioned in the preceding opinions of the Attorney General would seem to be also applicable to requests for copies of records and reports which the Department has received from other agencies and departments of the Government. In addition, Section 201.1(V)(4)(b) of the Security Regulations of the Department provides:9/

> "Distribution outside the reproducing Division of reproduced material originating in another Department or Agency must be specifically authorized in each instance by a responsible officer of the originating agency."

Aside from this regulation the furnishing to Congressional Committees of copies of such records and reports in its possession, regardless of the nature of the material contained therein, would appear to be in violation of the statutory right granted to heads of other Departments to determine the use to be made of the records of their Departments. Thus, the State Department would have no right to

furnish

7/ 25 Ops. Atty. Gen. 326
8/ 5 U.S.C. 22
9/ Section 201.3(VI)(A) for bids declassification of material originating in other departments or agencies.

furnish a Congressional Committee with material furnished it by the National Military Establishment or by any of the other Departments or Agencies comprising it would the consent of the Military Establishment or of the Department or Agency furnishing the information. Similar considerations would seem to apply in the cases of joint inter-agency documents, such as policy directives of SANACC. Such a document, if it were in the possession of the Department, could not be released without the consent of all the Agencies or Departments responsible for its issuance. SANACC documents are, of course, not kept in the Division of Communications and Records of the State Department, but are with the SANACC Secretariat.

On October 26, 1945 the State-War-Navy Coordinating Committee (SWNCC) agreed to appoint a Subcommittee to consider and act upon requests received from Congress for documents "whose release raises important questions of policy affecting the three departments and cannot appropriately be cleared through routine channels between the interested departments." This Subcommittee is now known as the State-Army-Navy-Air Force Coordinating Subcommittee for the Release of State Papers. Its terms of reference are as follows:

> "a. Authorize release of specific documents which in its judgment do not prejudice U.S. foreign relations or U.S. military security.
>
> "b. Arrange for the editing, where practicable, of documents requested by the Congress in order that they may meet the requirements of a above.
>
> "c. Refer the release of specific documents to higher authority when such action is deemed advisable.
>
> "d. Consider for release to agencies outside the State, War, and Navy Departments only those portions of papers which represent approved action of the Joint Chiefs of Staff or of the State-War-Navy Coordinating Committee.
>
> "e. Be authorized, in its discretion, to deviate from the general policy in paragraph d above without specific authorization from the State-War-Navy Coordinating Committee when, if in the opinion of the special subcommittee, such deviation involves no special consideration of major policy."

While

While it is doubtful that the Secretary can be said to be under a legal obligation to produce State Department documents of the character intended to be referred to this Subcommittee without consulting SANACC10/, it was doubtless the intention, when the Subcommittee in question was created by SWNCC, that cases of that character should be referred to that Committee. In most cases the documents will doubtless be of the character with respect to which the Secretary is regarded as having discretion to release or not to release.

While Section 102(e) of the National Security Act of 1947 gives the Director of Central Intelligence access to the intelligence of other departments and agencies, "for correlation, evaluation, and dissemination", it gives him no authority to furnish material to Congressional Committees without the consent of the agency affected. Moreover, he has the responsibility of "protecting intelligence sources and methods from unauthorized disclosures".

The security classification of a document would not seem to be a sufficient reason for refusing to produce it in response to a request from a Committee of Congress, where there were no other elements present which would warrant its being withheld. One such element would be a Departmental Regulation. The Department of State Security Regulations11/ require that testimony of a SECRET or a TOP SECRET nature be given only in executive session. Aside from this element, the question whether the request is for the production of the document in a closed session or in open hearings would not seem to make much difference, so far as this Department is concerned.

One other class of documents which there is an obligation not to disclose are those relating to the Employee Loyalty Program under Executive Order No. 9835 of March 21, 1947. The President's Directive of March 13, 1948 makes the non-disclosure of such material to unauthorized persons obligatory upon officers and employees of the Executive Departments.

There is

10/ SWNCC, the predecessor of SANACC, appears to have been created simply by an informal agreement between the State, War and Navy Departments.
11/ Departmental Regulations, Sec. 201.1(VI)(F)(2).

There is now pending in Congress H. J. Res. 342 which was introduced shortly after the President's Directive appeared. This Joint Resolution would direct "all executive departments and agencies of the Federal Government to make available to any and all standing, special, or select committees of the House of Representatives and the Senate information which may be deemed necessary to enable them to properly perform the duties delegated to them by Congress."

For a long time it was the practice of Committees of Congress desiring information from the Secretary of State to request the Secretary to furnish the information "if not incompatible with the public interest." A statement that it would be incompatible with the public interests to furnish the information was rarely, if ever, questioned.12/ However, now that Committees of Congress have taken to serving heads of Departments with subpoenas, it is not likely that the old practice will continue. The Act of June 22, 1938 (52 Stat. 942; 2 U.S.C. 192-195) provides penalties for witnesses failing to appear and testify.

Conclusions:

See attached memorandum

12/ United States v. Curtiss-Wright, supra.